No. 3750

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GRECO CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

P. PASTENE & COMPANY, Incorporated
(a corporation),
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF DEFENDANT IN ERROR.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of defendant in error for a rehearing in the above entitled matter heretofore presented to this Honorable Court upon a writ of error from the decision of the Honorable William C. Van Fleet, District Judge, theretofore made and entered in favor of your petitioner on or about the 30th day of August, 1920, respectfully represents:

I.

That this Honorable Court has apparently disposed of said appeal adversely to this petitioner upon a theory of defense not set out in the answer of plaintiff in error nor raised at the trial of the cause in the court below, and the failure to consider which was not specified and/or assigned to this court by plaintiff in error as one of the alleged errors committed by the trial court, to wit, upon the theory that:

> "Both of these parties knew that the article in question had never been produced in this country and that new machinery was essential to its manufacture *and they contracted with reference to that fact.*" (Opinion of the Court, page 7, paragraph 2. The italics are our own.)

and the deduction of the court from the above that:

> "The provisions of the contract to the effect that the seller should be relieved of his obligations thereunder in the event that performance thereof was prevented by a 'strike, fire or other circumstance beyond his control', protected the plaintiff in error from the liability imposed by the judgment complained of." (Opinion of the Court, page 3, paragraph 4.)

II.

That owing to the foregoing your petitioner has not been heretofore and was not upon the presentation of the appeal before this Honorable Court, given the opportunity properly to present its views or to furnish the court with arguments and au-

thorities bearing upon the view of this Honorable Court hereinabove set forth.

III.

That your petitioner is entitled to a rehearing before this Honorable Court because of the following facts disclosed by the record and the conclusions of law derived therefrom, which it is contended with the utmost seriousness are at variance with the above expressed views of this Honorable Court in the above entitled matter, to wit the fact that:

1. The product contracted for, known as Salsa De Pomidoro, while it had not been hitherto manufactured in the United States was an article frequently and widely manufactured in Italy for a great many years prior to the making of said contract. (There is no conflict in the testimony upon this point.)

2. That Victor V. Greco, who conceived the idea of manufacturing domestically this product for the Greco Canning Company, and Charles Pastene, who represented your petitioner in the transaction for the purchase of the same, were both Italians and were at the time of making the said contract and prior thereto, familiar with the product and its manufacture.

Under date of January 5, 1916, plaintiff in error wrote to petitioner as follows:

> "As we are Italian and know what the Italian people must have and *being very familiar with the method of manufacturing this article* you can rest assured that it will be the equal of that imported from Italy." (Defendant's Exhibit M; transcript p. 161 at p. 62. The italics are our own.)

3. That the only light in which the parties regarded the proposed manufacture of this product as an experiment in reference to which they contracted, was in the light of the *quality* to be produced.

4. That the record fails to disclose the existence of any doubt in the mind of either party at the time of contracting, as to the ability of plaintiff in error to procure machinery adequate to produce the *quantity* of the product ordered by your petitioner.

On page one hundred twenty-five of the transcript, paragraph three, Mr. Victor V. Greco testifies as follows:

> "There was nothing said between us respecting the installation of any particular form of machinery or whether such machinery was to be had in the United States."

5. That on the contrary the record shows that plaintiff in error expressly represented to your petitioner at, and prior to, the time when the contract between them was made, that said Greco Canning Company was in all respects familiar with the method of the manufacture of the product known as Salsa De Pomidoro, and was fully capable

of producing machinery adequate not only for the manufacture of the quantity ordered by your petitioner but a much larger quantity during the season of 1916.

(Letter of January 5, 1916, from Greco Canning Company to P. Pastene & Company, defendant's Exhibit "M", transcript pages 61 and 62.

Letter from Greco Canning Company to P. Pastene & Company under date of March 29, 1916, defendant's Exhibit "S", transcript pages 69 and 70.

It will be noted from these letters that Greco Canning Company does not state that it is about to *experiment* with packing Salsa De Pomidoro but that it is about to, and is actually going to, manufacture that product and is ready to take orders.)

6. That the sole reason for the failure of plaintiff in error to produce the quantity of Salsa De Pomidoro it had contracted to deliver to your petitioner lay in its failure, prior to the time of manufacturing, to provide itself with adequate machinery, i. e., with vacuum pans, the tubes leading from which were of adequate size to prevent clogging.

(Testimony of Victor V. Greco, transcript page 34, paragraph 3.)

7. That the inadequacy of the machinery provided by plaintiff in error was foreseeable, and could have been foreseen and remedied by the exercise of due diligence on the part of plaintiff in

error prior to the time of contracting with your petitioner and the time of entering upon the actual process of manufacture pursuant thereto.

(Testimony of Victor V. Greco, transcript page 34, paragraph 3. See also letter from Greco Canning Company to P. Pastene & Company dated December 26, 1916, transcript page 55, the last paragraph thereof on page 56.)

8. That the production of adequate machinery was at all times a matter within the control of, and subject only to the diligence of plaintiff in error in procuring the same.

9. That none of the correspondence of petitioner subsequent to the contract, relied on by the plaintiff in error as showing that the parties by their acts and declarations placed upon the contract the construction contended for by the latter, contains a definite agreement by petitioner to accept such construction, and all of it is colored by the misapprehension of petitioner to the effect that plaintiff in error was justifying his offer of pro rata delivery by reason of a crop failure, which would have justified such pro rata, rather than by reason of the plain inadequacy of its machinery, which was the fact.

(See letter from P. Pastene & Company to Greco Canning Company under date of November 7, 1916, Defendant's Exhibit "E", transcript page 48, paragraph entitled "Pro rata".)

10. That the effect of the ruling of this Honorable Court, reconsideration of which is hereby sought, is to permit a manufacturer, who has represented as a fact his ability to manufacture a given quantity of a given article of commerce, to experiment with such manufacture at the expense of a purchaser who has honestly believed and acted upon such representations as to ability by entering into a contract.

IV.

That the conclusions of law deducible from the above facts and from the record are as follows:

1. That with the exception of the clauses of the contract relating to "short pack" and to prevention of performance by "a strike, fire or other circumstance beyond control", plaintiff in error bound itself absolutely by the contract in question to deliver to petitioner the amount of Salsa De Pomidoro specified by such contract.

2. That plaintiff in error has failed to establish performance of the said contract by pro rata delivery under the "short pack" clause thereof.

(See evidence cited and comments thereon in brief for defendant in error, pages 12-18.)

3. That plaintiff in error and petitioner did not expressly or impliedly contract with reference to the ability of Greco Canning Company to procure

machinery adequate to the manufacture of the amount of Salsa De Pomidoro contracted for.

The mutual knowledge of the parties as to the character of the product and the positive assertions of plaintiff in error as to its ability to manufacture the same, absolutely preclude such inference. The very essence of a contract to deliver articles is ability on the part of the promisor to procure or make them.

Carnegie Steel Co. v. United States, 240 U. S. 156; 60 Law Edition 576.

4. The inadequacy of the machinery provided by plaintiff in error for the purpose of fulfilling its contract was not a "cause beyond its control" within the meaning of such contract, excusing performance.

The record shows that a successful and adequate process was afterward discovered by experiment and was, therefore, as a matter of law and fact, foreseeable from the outset. It could and would have been discovered had plaintiff in error exercised due diligence in ascertaining the size of vacuum tubes used by successful Italian manufacturers of the product or if plaintiff in error had been sufficiently diligent, prior to the attempted execution of petitioner's order, to make the very same experiment which it did make on the product ordered by petitioner. It was the duty therefore of plaintiff in error to discover that successful and adequate process, especially after positively repre-

senting that it had done so, before entering into obligations which its own lack of diligence made it impossible to fulfill.

Carnegie Steel Co. v. United States (supra);
Morgan v. Lyall, 16 Quebec King's Bench (1907), page 562;
Connorsville Wagon Co. v. McFarlan Carriage Co., 166 Indiana 123; 76 N. E. 294;
New York Coal Co. v. New Pittsburg Coal Co., 99 N. E. 198 (1912, Ohio);
Simpson Bros. Corporation v. John R. White & Son, Inc., 187 Fed. 418;
Vredenburgh v. Baton Rouge Sugar Co., 28 So. 122 (1899, La.).

5. The parties did not subsequently, by their conduct or otherwise, place upon the contract any practical construction which would justify plaintiff's failure fully to perform in the event of the inadequacy of its machinery.

The record nowhere shows that plaintiff in error ever gave the contract such a construction. Its attempts prior to the trial of this case to justify pro-rata delivery were not based upon the inadequacy of its machinery, but solely upon the alleged shortage of the tomato crop, and that was the sole justification thereof set up by it in the pleadings (see answer, transcript, pp. 10-15). We do not hear of this attempted justification due to inadequacy of machinery until it appears in defendant's opening statement on the day of the trial. It was a mere afterthought.

Moreover, none of the correspondence of petitioner relied on as establishing this contention, contains an unqualified acceptance of such construction. At most it shows no more than an inclination on the part of petitioner at the time the letters were written to deal as leniently as possible with the short-comings of plaintiff in error, and not to insist upon its full legal rights. Moreover all of the correspondence so relied upon is tinged with the misapprehension of petitioner as to the nature of the excuses being made by plaintiff in error for tendering only pro rata, i. e., in the misapprehension due to the representations made by plaintiff in error that the offer of pro rata was occasioned by the failure of the tomato crop, rather than by the inadequacy of the machinery provided by Greco Canning Company. In other words they were not the *"acts of both parties done with knowledge in view of a purpose * * * consistent with that to which they are * * * to be applied"*.

Sternbergh v. Brock, 225 Pa. 279 at page 287; 74 Atlantic 166.

Further requesting that a rehearing of the above entitled matter be granted, your petitioner represents:

I.

That the court below erred in allowing to plaintiff in error an abatement of twenty per cent (20%)

of the amount which it had contracted to deliver by reason of the alleged shortage of the tomato crop during the 1916 season, and as the basis of such contention in this respect specifies the following facts which it desires to represent to this Honorable Court:

1. That there is in the record no evidence to show that the paste line machinery of plaintiff in error used in the manufacture of the product contracted for, was ever shut down during the season of 1916 for lack of tomatoes and that *there is evidence* in the record to show *that such paste line machinery was never shut down for lack of tomatoes.*

2. There was no evidence offered by plaintiff in error to the *ratio* existing between the number of acres of tomatoes it contracted for and the number of acres it contracted to sell. In other words for aught that appears of record, and in spite of numerous requests for such testimony, plaintiff in error has failed to show that it did not create its own tomato shortage by selling more tomatoes than it had a right to expect from the acreage it had under contract.

It is confidently asserted by your petitioner that the foregoing state of the record supports the conclusion that plaintiff in error was not prevented *by a crop shortage due to causes beyond its control* from performing in full its contract with your petitioner.

Therefore, in order that your petitioner may have the opportunity of more fully and fairly presenting to this Honorable Court the matters hereinabove outlined, and that right and justice may be done, your petitioner through Messrs. Thomas, Beedy & Lanagan, its attorneys, respectfully requests that a rehearing of the above entitled matter be granted to said petitioner by this Honorable Court.

Dated, San Francisco,
February 6, 1922.

Respectfully submitted,

WILLIAM THOMAS,
LOUIS S. BEEDY,
JAMES LANAGAN,
THOMAS, BEEDY & LANAGAN,
Attorneys for Defendant in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for defendant in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
February 6, 1922.

LOUIS S. BEEDY,
Of Counsel for Defendant in Error and Petitioner.